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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the
Supreme Court of the United States

RENEE VICARY DBA ANGELS SPORTS BAR,
Petitioner,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION TWO**

PETITION FOR WRIT OF CERTIORARI

ROGER JON DIAMOND, ESQ.
Counsel of Record

2115 MAIN STREET
SANTA MONICA, CA 90405
(310) 399-3259
(310) 392-9029 FAX

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Does the application of Title 4, Section 143.3(a)(b) of the California Code of Regulations (prohibition against breast touching by female dancers) by the California Department of Alcoholic Beverage Control to female dancers who briefly touch their breasts (once or twice for a second or less during three minute dances) violate the First and Fourteenth Amendments to the United States Constitution?

2. Is erotic but non obscene speech entitled to less protection under the First and Fourteenth Amendments to the United States Constitution than other forms of speech?

3. May a state appellate court, consistent with the First and Fourteenth Amendments to the United States Constitution, apply its own subjective views regarding erotic dancing to conclude that it is not protected by the First and Fourteenth Amendments to the Untied States Constitution?

4. May speech be banned based upon its alleged primary effect or does such a bar violate the First and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner

Renee Vicary is the sole owner of Angel's Sports Bar in Corona, California.

Respondent

The Department of Alcoholic Beverage Control is a California agency established by Article 20, Section 22 of the California Constitution.

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Renee Vicary, doing business as Angels Sports Bar, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Two, entered on June 26, 2002.

On July 18, 2002 the Court of Appeal denied Vicary's Petition for Rehearing and on October 23, 2002 the California Supreme Court denied discretionary review.

OPINIONS BELOW

The order of the California Supreme Court denying discretionary review filed October 23, 2002 is reprinted in Appendix A hereto ("App. A") at page1a. The Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 99 Cal.App.4th 880, 121 Cal.Rptr. 2d 753 (2002) filed June 26, 2002 is reprinted in Appendix B hereto ("App. B") at page 2a . The decision of the Alcoholic Beverage Control Appeals Board filed August 16, 2001 is reprinted in Appendix C hereto ("App. C") at page 29a and is not reported officially.

The decision of the Department of Alcoholic Beverage Control filed March 23, 2000 is reprinted in Appendix D hereto ("App. D) at page 52a . It is not reported.

JURISDICTION

This Court has certiorari jurisdiction by virtue of Title 28, United States Code, Section 1257. Rule 13 of this Court's Rules provides that this Petition may be filed within 90 days of the date the California Supreme Court denied discretionary review of the decision of the Court of Appeal.

The California Supreme Court denied discretionary review on October 23, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner Renee Vicary ("Vicary") is the proprietor of Angels Sports Bar, a cabaret which features female dancers who perform topless while on a stage. The cabaret is licensed by Respondent Department of Alcoholic Beverage Control ("the ABC"). It is located in the City of Corona in Riverside County, California.

On February 11, 1999 ABC investigator Lowrey Spencer ("Spencer") went to Angels Sports Bar because he just happened to be in Corona that day (Reporter's Transcript, p. 28, hereinafter "RT"). Spencer entered the premises, which consisted of two parts, a sports bar on one side and a topless cabaret on the other (RT 29). He first went into the

sports bar and then to the cabaret, where females were dancing on a stage (RT 13-15).

Spencer proceeded to describe in general terms the dances which he observed. The disc jockey would introduce each dancer who would remove her top while dancing. Each dance lasted approximately three minutes (RT 15-16).

Spencer observed four or five employees including a doorman, a bartender, a disc jockey, and two waitresses (RT 18). Spencer testified that in general the dancers went on to the stage wearing clothes and then removed their tops while on the stage performing (RT 33).

The ABC enforces Title 4, Section 143.3(1)(b) of the California Code of Regulations, which prohibits dancers from "touching, caressing or fondling of the breast, buttocks, anus, or genitals." (hereinafter "Rule 143.3"). Rule 143.3 is not a criminal provision. A violation of Rule 143.3 allows the ABC to suspend or revoke a license issued by the ABC. Without an ABC license a business such as Angels Sports Bar may not provide alcoholic beverages to its patrons.

Spencer expressed his interpretation of Rule 143.3 (RT 32, lines 13-14). Spencer said that it would be ". . . a violation if the dancer merely touches her breasts . . . ." (RT 33, lines 4-6). Spencer also expressed his opinion that if a dancer were not topless but were wearing a top and touched the clothing that covered her breasts there would be a violation. In other words, to be a violation of the rule there does not have to be skin to skin touching. A dancer who touches the clothing covering her breasts would be guilty of violating the rule in Spencer's opinion (RT 34-35). Spencer also said that it could be a violation of the rule if a dancer,

while removing her top as part of her performance, touched her breasts (RT 35, lines 11-16).

Spencer went on to elaborate his interpretation of Rule 143.3 as the following exchange reveals:

> "Q. Now, in terms of the length of time that the touching occurs, it's your position that no matter how brief or short the actual contact might be between the hand and the breast, no matter how slight, no matter how brief in duration, there would be a violation?
> A. Yes, sir.
> Q. Even less than a second; is that right?
> A. Would be a violation
> Q. That's the way you interpret the rule?
> A. Yes, sir."

Spencer described the dancing that he observed on February 11, 1999.

Here Vicary will summarize the testimony with respect to one dance. This dance was charged as a separate violation of Rule143.3 and was the basis of the suspension in this case although six other dancers were also the subject of the ABC accusation against Vicary. She is focusing on this particular dance to raise the First Amendment issue presented by this Petition. Reversal by this Court would require the ABC to reconsider its decision to suspend Vicary's license. Vicary also challenges the decision of the ABC with respect to the

other six dances, but this Court need not examine them to decide this case. [1]

Count 6 of the ABC accusation against Vicary alleged that a dancer, Robyn Ann Gushi, violated Rule 143.3

Spencer testified that Robyn while in the center stage dancing topless ". . . rubbed her hands across her breasts." (RT 23, lines 12-15). Spencer said this lasted for "a few seconds." (RT 23, line 24). On cross examination Spencer testified that the touch took about a second. He thought it was done several times but he did not recall the exact number. Each time was just a brief second or less and the dance itself lasted three minutes (RT 51, lines 1-11).

The ABC's Finding IX was that Gushi touched her breasts but the number of times cold not be determined. The ABC determined that one touching lasted "about a second." Spencer himself testified that the touch ". . . was just a brief second or less . . . ." (RT 51, lines 6-8)

Based upon Spencer's observations the ABC initiated a civil disciplinary proceeding against Vicary by filing an accusation which alleged that Gushi violated Rule 143.3 during her dance. The accusation also alleged other female dancers violated Rule 143.3. Vicary was provided an

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[1] Vicary has no objection to this Court's evaluation of the other dances, but this Court need not evaluate them given the decision of the Court of Appeal that the particular dance about to be described was a sufficient basis for the suspension notwithstanding the First Amendment.

administrative hearing by an ABC Administrative Law Judge,[2] who rejected her First Amendment argument that the dance, with the brief touch, was constitutionally protected. Vicary relied unsuccessfully upon footnote 5 of this Court's decision in *California v. La Rue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), which stated that while Rule 143.3 was facially valid, its application to particular dances might violate the First Amendment.

The ABC adopted the recommended decision of the Administrative Law Judge that Vicary's license be suspended for 30 days. Vicary appealed the ABC's suspension decision to the Alcoholic Beverage Control Appeals Board, which reversed the ABC and agreed with Vicary's First Amendment argument.

The ABC petitioned the California Court of Appeal for discretionary review of the decision of the Alcoholic Beverage Control Appeals Board. The Court of Appeal exercised its discretion to hear the ABC's challenge to the Appeals Board's decision.

On June 26, 2002 the California Court of Appeal reversed the Appeals Board and held that the dance in question was not protected by the First Amendment or, if it was, that the ABC had the right to prohibit such dancing at premises which it licenses. *Department of Alcoholic Beverage*

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[2] Vicary separately challenged the fairness of a hearing where the hearing officer is an employee of the accusatory body. The Court of Appeal rejected Vicary' due process challenge to the fairness of the hearing procedure; Vicary is not raising the due process issue in this Petition.

Control v. Alcoholic Beverage Control Appeals Board, 99 Cal.App.4th 880, 121 Cal.Rptr. 2d 753 (2002).

On July 18, 2002 the Court of Appeal denied Vicary's Petition for Rehearing. Vicary petitioned the California Supreme Court for discretionary review. She contended in her Petition that the decision of the Court of Appeal was contrary to the First Amendment. The California Supreme Court denied discretionary review on October 23, 2002.

REASONS FOR GRANTING THE WRIT

1 CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER EROTIC BUT NON OBSCENE EXPRESSION IS ENTITLED TO LESSER FIRST AMENDMENT PROTECTION THAN OTHER EXPRESSION (NON EROTIC)

Thirty years ago this Court upheld the facial validity of Rule 143.3, which prohibits all sorts of conduct by dancers performing at locations where alcohol is served. A number of businesses which provided alcoholic beverages to its customers had filed a federal lawsuit challenging the facial validity of the Rule. The District Court invalidated the Rule on First Amendment grounds, but this Court reversed *California v. La Rue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), finding support for its position in the Twenty-First Amendment.[3]

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[3] Later this Court retreated from its reliance upon the Twenty-First Amendment, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

This Court in footnote 5 of the *La Rue* decision held open the possibility that an "as applied" challenge could still be made in an appropriate case. Specifically, this Court stated in footnote 5:

> "Because of the posture of this case, we have necessarily dealt with the regulations on their face and have found them to be valid. The admonition contained in the Court's opinion in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966), is equally on point here: 'Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid.'"

The California Court of Appeal responded to Vicary's contention that the particular dance in question, Ms. Gushi's one second brushing of her breast during her three minute dance on a stage, was a form of expression protected by the First Amendment, by misstating the law.

> ". . . It may well be true that Rule 143.3 could not be constitutionally applied to a reasonably high - minded display of serious artistic material in conjunction with alcohol, but that is not this case. As the cases reiterate, erotic dancing is not entitled to the same protection as Shakespeare's Hamlet."

The quotation above from the Court of Appeal's Slip Opinion is expanded in its footnote 21, which refers to "Ophelia."

The Court of Appeal repeated this erroneous view of the law in its footnote 24 and the text which accompanies footnote 24. After improperly relying upon something ". . . other than direct experience in characterizing the typical topless dances performed in bars . . .," the Court made the following unsupported statement:

> "We note that at oral argument, Vicary appeared to take the position that there was no 'continuum' supporting a varying application of the First Amendment. We believe that the United States Supreme Court has clearly recognized that the constitutional protection varies with the type of speech, and that it lightens (but does not dissipate) near the 'outer ambit' in which Vicary's dancers operate. (*See Pap's A.M., supra*, 529 U.S. at p. 289.)"

The statement quoted above contained in footnote 24 of the Court of Appeal's opinion is totally false. This Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289; 146 120 S.Ct. 1382, 1391; L.Ed.2d 265 (2000) was referring to nude dancing, not to "the type of speech. . . ." To be accurate (as we should), Associate Justice O'Connor made the following statement:

> "Being 'in a state of nudity' is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the

outer ambit of the First Amendment's protection. . . ."

Two things must be said about Justice O'Connor's statement. First, only the Chief Justice and Justices Kennedy and Breyer joined in this portion of O'Connor's opinion.

Second, Justice O'Connor was referring to nude dancing; the ordinance in the *City of Erie v. Pap's A.M.* case purported to ban public nudity. Again, the issue before the Supreme Court was nudity. That is not the issue in this case.

Justice O'Connor referred to two other cases, *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991) and *Schad v. Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed. 2d 671 (1981).

With respect to the first case cited by Justice O'Connor, *Barnes v. Glen Theater, Inc., supra*, Chief Justice Rehnquist wrote the lead opinion but only two other Justices concurred, O'Connor and Kennedy. Indeed, Justice O'Connor noted in *City of Erie v. Pap's A.M.*, that the opinion to which she referred, *Barnes v. Glen Theaters, Inc.*, was only a plurality opinion. As Justice O'Connor stated in *City of Erie v. Pap's A.M.*, Chief Justice Rehnquist referred only to nude dancing when he stated "that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment . . . ."

The earlier case to which Justice O'Connor referred, *Schad v. Borough of Mt. Ephraim, supra*, was a decision wherein a majority of the Court reversed criminal convictions of operators of an adult bookstore who violated a local zoning ordinance by introducing a coin operated mechanism that permitted customers to watch live dancers, usually in the

nude, perform behind a glass panel. Justice White's opinion for the majority stated,

> ". . . Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. . . . Nor may an entertainment program be prohibited solely because it displays the nude human figure. . . . Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation. . . ."

Therefore, neither the Supreme Court cases in *City of Erie v. Pap's A.M.*, *Barnes v. Glen Theater, Inc.*, nor *Schad v. Borough of Mt. Ephraim*, had a majority that ruled that nude dancing is not entitled to the same protection as other forms of speech. While it is true that a plurality of the Court has made such a statement regarding nude dancing, no majority of the Court has ever declared that erotic dancing is not entitled to the full protection of the First Amendment.

In *United States v. United States District Court*, 858 F.2d 534 (9th Cir.1988), the U.S. Court of Appeals recognized the lack of a majority opinion on the question of whether there is a hierarchy of First Amendment protected activity. Ninth Circuit Justice Alex Kozinski wrote the following for the majority:

> "At oral argument, government counsel suggested for the first time that we need not be too concerned about inhibiting the production

of non obscene blue movies because these do not enjoy quite as much first amendment protection as other types of speech. An incidental burden on that type of expression would therefore be permissible, she argued, even where a similar burden on mainstream protected speech might not be. Unable to provide us with any authority for this proposition, government counsel later submitted a supplemental declaration referring us to "the Supreme Court decision" in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452-53, 49 L.Ed.2d 310 (1976). The cited passage states in part as follows:

'[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate....'

Id. at 70, 96 S.Ct. At 2452 (opinion of Stevens, J.) While this passage certainly supports the government's theory, it is not the voice of the Court, merely the view of four Justices. Justice Powell, who provided the fifth vote for the remainder of the Young opinion, refused to join this part, noting that "I do not think we need reach, *nor* am I *inclined* to *agree with*, the holding in Part III (and supporting discussion) that nonobscene, erotic

materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n. 1, 96 S.Ct. at 2453 n. 1 (Powell, J., concurring) (emphasis added). Nor, of course did the four dissenting Justices agree with the plurality, characterizing its argument as "a concept wholly alien to the First Amendment." *Id.* at 86, 96 S.Ct. at 2460 (Steward, J., dissenting). Two years later, a majority of the Justices again refused to embrace the notion that the degree of first amendment protection "depend[s] on the Court's judgment as to the value of the protected speech that might be deterred." *FCC v. Pacifica* Found, 438 U.S. 726, 761-62 n. 4, 98 S.Ct. 3026, 3046-47 n. 4, 57 L.Ed.2d 1073 (1978) (Powell, J, concurring); *see id.* at 762-63, 98 S.Ct. at 3047-48 (Brennan, J., dissenting); *see also J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 489 (9th Cir. 1984) (speech not obscene under *Miller* "is entitled to the highest form of protection afforded by our laws and constitution"), *rev'd on other grounds sub nom.* Brocket v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 663 n. 10 (8th Cir. 1981). Unless and until the Supreme Court speaks otherwise, we are bound to the view that the constitutional wall against government censorship protects this nether region of public discourse as fully as the heartland of political literary and scientific expression and debate."

Accordingly, the California Court of Appeal is plainly wrong when it states that this Court has clearly recognized that the constitutional protection varies with the type of speech. Footnote 24 infects the entire opinion of the California Court of Appeal. The Court's statement at page 21 ("...[D]ancers of this sort are entitled to at least some First Amendment protection.") is not accurate. The words "at least some" should have been deleted. This Court cannot allow this statement to go uncorrected. There is no controlling United States Supreme Court authority for it. This Court should grant certiorari to decide whether there is a hierarchy of expression, not all of which is protected.

2. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CALIFORNIA COURT OF APPEAL AND THE SEVENTH CIRCUIT REGARDING THE GOVERNMENT'S REGULATION OF DANCING

The United States Court of Appeals for the Seventh Circuit in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir.2000) struck down an ordinance that purported to regulate the manner in which a dancer could dance an erotic dance. The Court of Appeal below attempted to distinguish the *Schultz* case by pointing out that the *Schultz* case did not involve liquor but the Seventh Circuit did not limit its ruling to places where liquor is dispensed. *See also Saints and Sinners v. City of Providence*, 172 F.Supp.2d 348, 355 (D.R.I. 2001) (". . . while there is no explicit right to a liquor license, there is a right not to have a liquor license be used as a tool to silence First Amendment rights. . . .")

The fact of the matter is the regulation, as applied, sanctions the dancers (actually Vicary) for particular erotic maneuvers performed during the dance. The instant case is not a case where a female dancer went onto a stage and without performing grabbed her breasts for some extended time with no pretense to dancing. Here everyone concedes that the performers in question were dancing. As applied to this case Rule 143.3 violates the First Amendment. Review by this Court would be most helpful to the adult industry. This Court has not handed down a decision in this area of the law since at least *California v. La Rue, supra.*

3. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEAL'S APPLICATION OF ITS OWN SUBJECTIVE VIEWS REGARDING EROTIC DANCING CONFLICTS WITH THE COURT'S DECISION IN *UNITED STATES V. PLAYBOY ENTERTAINMENT GROUP, INC.*

The Court of Appeal stated in footnote 24 that it would not be unfair for the Court ". . . to rely on other than direct experience in characterizing the typical dances performed in bars." The Court of Appeal's hostility to erotic art, literature, and dance is overwhelming. The Court frequently refers to what it considers more high brow dancing than "typical topless dancing performed in bars."

Teachings of this Court tell us, however, that it is improper for lower appellate courts to engage in this sort of discussion. In *United States v. Playboy Entertainment Group, Inc., supra,* this Court stated in striking down the Telecommunications Act, which required cable operators to

scramble sexually explicit channels in full or limit programing on such channels to certain hours,

> "When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are the for individual to make, not for the Government to decree, even with a mandate or the approval of a majority. . . . " *Id.*, 529 U.S. at 818, 120 S.Ct. at 1889.

The Court of Appeal's comment in footnote 16 also reveals the defect in its opinion. Instead of focusing on the entire dance the Court of Appeal focused just on "the specific conduct which violated Rule 143.3. . . ." In other words, the Court of Appeal focused on the brief brushing or touching of the breasts and did not consider the context in which the acts took place. Focusing on certain, limited acts rather than viewing the performance as a whole violated the teaching of this Court in *Miller v. California*, 413 U.S. 15, 24, 37 L.Ed.2d 419, 93 S.Ct. 2607, 2615 (1973) which requires the material to be taken as a whole.

The Court of Appeal, applying its own subjective values, might not believe that a brief one second brush of the breasts is part of the erotic message of a dance but performers obviously disagree with the Court of Appeal. In footnote 24 the Court of Appeal referred to Vicary's request that the Court take judicial notice of the fact that singer Michael Jackson frequently grabs his crotch during performances. The Court of Appeal did not indicate whether it was granting such a request but it is a well known fact. Michael Jackson is not just a singer but also a dancer. Some erotic dances involve some brief touching. That is all that was before the Court of Appeal and that was before the ABC.

4. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEAL IGNORED DECISIONS OF THIS COURT WHEN IT HELD THAT EXPRESSION MAY BE RESTRICTED BECAUSE OF ITS PRIMARY EFFECT ON THE AUDIENCE.

The Court of Appeal's opinion is replete with references to so called secondary effects. The Court of Appeal's discussion of the secondary effects doctrine reflects a complete misunderstanding of it. The Court of Appeal applied the secondary effect doctrine from the adult zoning cases and has completely ignored applicable decisions by this Court. Beginning at page 8 of the Court of Appeal's opinion, the Court of Appeal referred to the "secondary effects" of certain types of entertainment. At page 10 the Court of Appeal stated that the government has an interest in regulating the effect of speech on the listener. The Court of Appeal again referred to secondary effects at page 13 of its opinion and also again at page 14. In footnote 14 at the bottom of page 14 the Court of Appeal again referred to "secondary

effects." Again at the middle of page 19 the Court of Appeal referred to the "deleterious secondary effects . . . , immoral or unlawful actions by the viewers. . . ." Again, at page 21 the Court of Appeal referred to "the potential for negative secondary effects. . . ."

This case is manifestly not an adult zoning case This Court spoke about secondary effects of adult businesses in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976). The secondary effects referred to by this Court are the effects or alleged effects of the adult business on the surrounding community in terms of reduction of property values and crime in the surrounding areas. Even then this Court said that cities could not totally ban adult businesses or make it unreasonably difficult for them to operate - only that under the zoning authority cities could regulate the location of such businesses. Here there is no contention that Ms. Vicary is operating her Angels Sports Bar in an inappropriate location.

What the Court of Appeal mistakenly considered to be "secondary effects" is actually the alleged impact that the brief touching or brushing of the breast by the dancers may have on the audience actually observing such conduct. The Court of Appeal confused the secondary effect doctrine with the primary effect doctrine.

This Court has already rejected the precise argument advanced by the Court of Appeal in sustaining the imposition of discipline against Ms. Vicary because some of her dancers briefly (a split second) brushed their breasts as part of their erotic dances. Vicary refers this Court to the following passage from this Court's decision in *Boos v. Barry*, 485 U.S. 312, 320, 99, 108 S.Ct. 1157, 1163, L.Ed.2d 333 (1988):

"We most recently considered the definition of a content - neutral statute in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). . . . The content of the films being shown inside the theaters was irrelevant and was not the target of the regulation. Instead, the ordinance was aimed at the 'secondary effects of such theaters in the surrounding community,' . . . effects that are almost unique to theaters featuring sexually explicit films. . . .

So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.

Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. . . . "

This Court repeated this concept in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394, 120 L.Ed. 2d 305, 112 S.Ct. 2538, 2549 (1992):

". . . Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can never be considered to be directed only to the secondary effects of such speech, it is clear

> that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed. 2d 333 (1988), 'Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*.'. . ."

To remove any possible belief that the government has a right to consider the impact of speech on the audience Vicary refers this Court to its recent decision in *Ashcroft v. Free Speech Coalition*, __ U.S. __, 122 S.Ct. 1389 (2002). In this case this Court struck down the federal Child Pornography Prevention Act of 1996 with respect to its prohibition against computer generated child pornography. While the child pornography statues in general may be upheld because of the Government's legitimate interest in protecting children from sexual exploitation, this Court said that the Government had no legitimate interest in shielding computer generated fictitious children engaging in sexual activity from pedophiles. This Court referred to the Government's argument and then rejected it:

> "The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it...."

Likewise, the ABC could not argue that the conduct in question here was not deserving of protection because some members of the audience might have become aroused or

unruly. The ABC offered no evidence at the hearing as to any unruly conduct on the part of the audience.

This Court has made it clear over and over again that the burden of proof is on the government to justify the action it takes when it attempts to restrict speech. In *United States v. Playboy Entertainment Group*, 529 U.S. 803, 816, 120 S.Ct. 1878, 1888, 146 L.Ed.2d 865 (2000) this Court stated in striking down the Telecommunications Act which was directed at sexually explicit television channels,

> ". . . When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . ."

Here the ABC failed in its burden. Vicary made this argument in her Return to Writ of Review filed January 3, 2002 (page 30) but the Court of Appeal ignored the argument.

CONCLUSION

The issues raised in this Petition are worthy of review by this Court. Thirty years have gone by since footnote 5 appeared in *California v. La Rue*. This case presents this Court with the opportunity to clarify what it meant. The conflict between the Seventh Circuit and the California Court of Appeal may also be resolved. This Court may also wish to respond to the Pennsylvania Supreme Court, which on remand in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), rejected this Court's analysis and relied upon the free speech provision of the Pennsylvania Constitution to allow nude dancing. *See Pap's A.M. v. City of Erie*, ___ Pa. ____, ___ A2d ___, 2000 WL31846311 (Pa 2002). It is time this Court stood up to the Taliban forces in our country and restored freedom of erotic expression to its

proper place. This country has not yet become the Islamic Republic of the United States.

Respectfully submitted,

ROGER JON DIAMOND
2115 Main Street
Santa Monica, CA 904005
(310) 399-3259
Attorney for Petitioner

APPENDIX A

Court of Appeal, Fourth Appellate District,
Division Two - No. E030224

S108906

IN THE SUPREME COURT OF CALIFORNIA

[Filed October 23, 2002]

En Banc

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitioner,	)
v.	)
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF CALIFORNIA, Respondent;	)
RENEE VICARY, Real Party in Interest.	)

Petition for review DENIED.

/s/ George
Chief Justice

APPENDIX B

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent;

RENEE VICARY, Real Party in Interest.

SUMMARY

The Department of Alcoholic Beverage Control suspended the liquor license of the owner of a bar that offered topless entertainment, finding violations of Cal. Code Regs., tit. 4, §§ 143.3, in that dancers touched their bare breasts during dances and exposed their breasts while they were within six feet of patrons. The Alcoholic Beverage Control Appeals Board reversed the decision, finding that §§ 143.3 could not be constitutionally applied to the expressive conduct of the dancers.

The Court of Appeal annulled the order of the board and remanded to the board for reconsideration of the penalty. The court preliminarily held that the department's appointment of its employee to act as administrative law judge did not violate owner's due process rights. The court held that Cal. Code Regs., tit. 4, §§ 143.3, is not unconstitutional. Section 143.3 does not regulate or prohibit nude or erotic

dancing in general; it is only an attempt to reduce the problems caused by such dancing in front of customers whose inhibitions and ability to control their impulses have been weakened by the consumption of liquor. This does not offend the Constitution. (Opinion by Hollenhorst, Acting P. J., with McKinster and Gaut, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Administrative Law §§ 42--Adjudication--Due Process-- Liquor License Penalty Proceeding--Administrative Law Judge Employed by Department of Alcoholic Beverage Control:Constitutional Law §§ 109--Due Process--Hearing.

In a Department of Alcoholic Beverage Control proceeding to suspend the liquor license of an owner of a bar, the department's appointment of its employee to act as administrative law judge (ALJ) did not violate the owner's due process rights. Although Gov. Code, §§ 11502, provides that ALJ's must be on the staff of the Office of Administrative hearings, Gov. Code, §§§§ 11415.10 and 11415.20, limit this rule when a specific statute applies to an agency. The ALJ acted under the authority of Bus. & Prof. Code, §§ 24210, which allows the department to delegate the power to hear and decide to an ALJ appointed by the director. The statute previously required ALJ's to be appointed pursuant to the Administrative Procedures Act, and thus the current version, which omits any reference to the act, is intended to permit the department to establish a staff of ALJ's. Further, that the ALJ was employed by the department did not lead to the conclusion that he was biased. The fact that an agency or

entity holding a hearing also pays the adjudicator does not automatically require disqualification. ALJ's are protected by civil service laws against arbitrary or retaliatory dismissal, and thus they are not influenced to rule for their employer. Nor was there any other factor indicating this ALJ was biased.

(2) Statutes §§ 52--Construction--General and Specific Provisions.

Where two statutes consider the same subject matter, the more specific prevails over the more general. However, this principle only applies if the two statutes cannot be reconciled.

(3) Administrative Law §§ 42--Adjudication--Due Process.

Due process applies to administrative proceedings as well as to judicial proceedings. However, at least in the administrative context, all that is required is that the hearing officer or other decision maker be a reasonably impartial, noninvolved reviewer.

(4a, 4b, 4c) Alcoholic Beverages §§ 7--Regulations--Validity-- Restrictions on Erotic Entertainment in Establishment Selling Alcohol:Constitutional Law §§ 55--First Amendment--Freedom of Expression.

Cal. Code Regs., tit. 4, §§ 143.3, which places certain restrictions on erotic entertainment in establishments selling alcoholic beverages, is not unconstitutional. Thus, the owner of a bar that offered topless entertainment was subject to penalties by the Department of Alcoholic Beverage Control, where there were violations of §§ 143.3, in that dancers

touched their bare breasts during dances and exposed their breasts while they were within six feet of patrons. Although nude dancing is covered by U.S. Const., 1st Amend., it falls only within the outer ambit of protection, and if a regulation is directed at genuine secondary effects of the regulated conduct, the regulation is content neutral. The state is authorized under the police power to enact regulations affecting public health and morality. The adoption of §§ 143.3 was supported by ample evidence of the deleterious effects inherent in the combination of alcoholic beverages and explicitly erotic performances; regulation of performances will therefore logically reduce the negative secondary effects and thus further the governmental interest. Further, the governmental interest is not related to the suppression of any particular expression or expression in general. Finally, §§ 143.3 regulates conduct, and any incidental effect on the expressive element of nude dancing is de minimis. Section 143.3 does not regulate or prohibit nude or erotic dancing in general; it is only an attempt to reduce the problems caused by such dancing in front of customers whose inhibitions and ability to control their impulses have been weakened by the consumption of liquor.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 327; West's Key Number Digest, Constitutional Law k. 90.4(5), West's Key Number Digest, Intoxicating Liquors k. 15.]

(5) Alcoholic Beverages §§ 1--Regulation by State. There is no inherent right to sell intoxicating liquors. The liquor business is fraught with danger to the community, and it may therefore be either entirely prohibited or permitted under such conditions as are prescribed by the regulatory agency. Once

granted, a license may be revoked or suspended for the protection of the public welfare and morals. Thus, the state may properly regulate establishments that sell alcoholic beverages to patrons to protect the public interest in a safe and relatively seemly environment.

(6) Constitutional Law §§ 55--First Amendment--Freedom of Expression--Erotic Entertainment at Establishment Selling Alcohol.

In determining the effects on constitutionally protected conduct of a city's restriction on erotic entertainment at establishment selling alcohol, the city need not conduct its own study regarding these effects. It may rely on evidence already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

COUNSEL
Bill Lockyer, Attorney General, Dennis W. Dawson and Chris A. Knudsen, Deputy Attorneys General, for Petitioner.
No appearance for Respondent.
Roger Jon Diamond for Real Party in Interest.

HOLLENHORST, Acting P. J.
Real party in interest Renee Vicary (Vicary) is the proprietor of Angels Sports Bar, which offers topless entertainment. The bar is licensed to serve alcoholic beverages and accordingly is supervised by petitioner Department of Alcoholic Beverage Control (Department). During an investigation, Department investigators observed dancers employed by Vicary at the bar touching and fondling their bare breasts during dances. Other

dancers were observed exposing one or more breasts while sitting or standing within six feet of patrons.

The Department thereafter filed an accusation alleging that Vicary's employees had seven times violated title 4, section 143.3, subdivision (1)(b) ("touching, caressing or fondling of the breast, buttocks, anus or genitals") of the California Code of Regulations,[1] and had once violated title 4, section 143.3, subdivision (2) of the California Code of Regulations, which prohibits the exposure of breast or buttock unless the dancer is on a raised stage at least six feet from patrons.

At the scheduled hearing, Vicary first raised a constitutional challenge to the power of the administrative law judge (ALJ), an employee of the Department, to hear the case. This challenge was rejected and the hearing proceeded. The ALJ sustained all counts of the accusation and a license suspension of 30 days was imposed. Vicary duly appealed. (Cal. Const., art. XX, §§ 22; Bus. & Prof. Code, §§ 23081.) The Alcoholic Beverage Control Appeals Board (Board) reversed the decision of the ALJ not on factual grounds, but on the basis that Rule 143.3 could not be constitutionally applied to the arguably "expressive" conduct of the dancers. The Department sought judicial review from this court. (Bus. & Prof. Code, §§ 23090.) We issued a writ of review, and now annul the decision of the Board.

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[1] In accordance with the practice of the parties, we will refer to this regulation as "Rule 143.3."

Discussion

A.

(1a) We first address the threshold issue of the ALJ's legal power and the propriety of his employment as a decision maker. Vicary argues that he was not selected in conformity with the Administrative Procedures Act, specifically Government Code section 11502;[2] further, that because he was an employee of the Department, his implicit bias deprived her of due process. Neither contention has merit.

Section 11502, subdivision (a), provides that "[a]ll hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings." However, subdivision (a) of section 11501 qualifies this requirement by stating: "This chapter applies to any agency *as determined by the statutes relating to that agency*." (Italics added.) Here, the ALJ acted under the authority of Business and Professions Code section 24210, which provides in subdivision (a) that "[t]he department may delegate the power to hear and decide to an administrative law judge appointed by the director." As petitioner points out, this statute was amended in 1994 to delete the existing provision that matters be heard pursuant to the Administrative Procedures Act statutes, and instead to empower the director of the Department to appoint ALJ's. Furthermore, sections 11415.10 and 11415.20 clearly confirm that "[t]he governing procedure by which an agency conducts

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[2] All further statutory references will be to the Government Code unless otherwise indicated.

an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding," and that "[a] state statute ... applicable to a particular agency ... prevails over a conflicting or inconsistent provision of this chapter."[3] (2) These provisions make explicit the applicability of the rule that where two statutes consider the same subject matter, the more specific prevails over the more general. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577 [7 Cal.Rptr.2d 245, 828 P.2d 147].)[4]

(1b) Vicary's assertion that Business and Professions Code section 24210 merely authorizes the director of the Department to select an ALJ from the staff of the Office of Administrative Hearings to hear a particular case is without merit. This was the procedure under the *previous* version of the statute, and its express references back to the Administrative Procedures Act. The new version must have been designed to accomplish some alteration in procedure; to

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[3] Section 11415.10 goes on to further clarify, if further clarification is needed, that "[i]f no other governing procedure is provided by statute or regulation, an agency may conduct an adjudicative proceeding under the administrative adjudication provisions of the Administrative Procedure Act."

[4] It is true that the principle only applies if the two statutes cannot be reconciled. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478 [66 Cal.Rptr.2d 319, 940 P.2d 906].) However, Business and Professions Code section 24210, which allows the director to appoint ALJ's, cannot be reconciled with Government Code section 11502's requirement that administrative hearings be held before an ALJ on the staff of the Office of Administrative Hearings. Thus, the rule cited in *San Francisco Taxpayers Assn. v. Board of Supervisors*, *supra*, 2 Cal.4th at page 577 applies.

construe substantial changes in language as effecting no change would be absurd. We think it obvious that the intended change was to permit the director to establish a staff of Department ALJ's.[5] The new version provides that the Department may delegate its powers to an ALJ "appointed by the director," and in the context of state employment, "appointed" is frequently equivalent to "hired." (See §§ 18525.) We think it plain that the Department is authorized to hire and use its own ALJ's rather than to use those selected and employed by the Office of Administrative Hearings.

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[5] The Department's position is supported by legislative history. (See Legis. Counsel's Dig., Assem. Bill No. 463 (1994-1995 Reg. Sess.); Sen. Com. on Governmental Organization, Analysis of Assem. Bill No. 463 (1994- 1995 Reg. Sess.) p. 2.)

On the other hand, Vicary attempts to make much of the fact that certain statutes authorizing *other* agencies to appoint their own employees as hearing officers include an express requirement that the officers be "impartial." (See, e.g., Lab. Code, §§ 1742, subd. (b); Unemp. Ins. Code, §§ 404.) Vicary argues that the omission of this word from Business and Professions Code section 24210 can only be explained by the fact that the section really requires the use of ALJ's from the Office of Administrative Hearings who are *presumptively* impartial. As noted below, it is not self-evident that such ALJ's would be more impartial than Department ALJ's. We think that the drafters of the cited statutes included the requirement that the hearing officer be "impartial" simply as a matter of course, and that the omission of the term in the Business and Professions Code statute gives rise to no persuasive inference. What the cited statutes *do* demonstrate is that it is not at all unique for the Legislature to provide for a state agency's use of "in-house" ALJ's.

Vicary's second argument raises the issue of due process, which of course includes the right to an impartial decision maker. (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841 [82 Cal.Rptr.2d 44].) (3) Due process applies to administrative proceedings as well as to judicial proceedings. (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 582 [257 Cal.Rptr. 427].) However, at least in the administrative context, all that is required is that the hearing officer or other decision maker be a " 'reasonably impartial, noninvolved reviewer.' " (*Linney v. Turpen* (1996) 42 Cal.App.4th 763, 771 [49 Cal.Rptr.2d 813] (*Linney*).)

(1c) Vicary's position is that because the ALJ was employed by the Department, he necessarily had a bias in favor of the Department which would be prompted by a perceived need to please the Department in order to keep his job. We recognize that no showing of *actual* bias is necessary if the challenged adjudicator has a strong, direct financial interest in the outcome. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1032-1034 [119 Cal.Rptr.2d 341, 45 P.3d 280] (*Haas*).) However, it has been consistently recognized that the fact that the agency or entity holding the hearing also pays the adjudicator does not automatically require disqualification (see *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735 [110 Cal.Rptr.2d 565]; *Linney, supra*, 42 Cal.App.4th at pp. 770-771), and *Haas* confirms this. (*Haas, supra,* 27 Cal.4th at p. 1031.) As the Supreme Court also noted in *Haas*, such a rule would make it difficult or impossible for the government to provide hearings which it is constitutionally required to hold.

Haas involved a county which had no regular "hearing officer," but simply hired attorneys to serve on an ad hoc basis. The vice of the system was that an attorney who desired future appointments had a financial stake in pleasing the county, and that the county had almost unrestricted choice for future appointments. In this case, ALJ's are protected by civil service laws against arbitrary or retaliatory dismissal. (See §§ 18500 et seq.) Thus, there is no basis upon which to conclude that the ALJ was influenced to rule in favor of the Department by a desire for continued employment.

As the court noted in *Linney*, current law also authorizes disqualification if the circumstances would lead a reasonable person to suspect bias. (Code Civ. Proc., §§ 170.1, subd. (a)(6); *Linney, supra,* 42 Cal.App.4th at p. 776.) Given that the ALJ's financial interest in the result is too attenuated to require disqualification without a showing of actual bias, we find Vicary's other speculative and factually bare concerns about the ALJ's presumed "coziness" with the Department insufficient to raise a suspicion of bias.[6] The record contains no information on the manner in which an ALJ is selected by the Department for any given hearing which would suggest any possibility of bias. Finally, although Vicary insists that

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[6] We note that under Vicary's theory, members of the Board could be similarly challenged, as they are subject to-or "fearful of"-removal by the Governor at his pleasure, or by majority vote of the Legislature for dereliction of duty, corruption, or incompetence. (Cal. Const., art. XX, §§ 22.) Furthermore, they are just as likely to be "cozy" with the Department enforcement personnel as are the ALJ's. Such an approach to disqualification, however, would essentially prevent the government from ever holding hearings on matters of public importance.

the Department should employ ALJ's provided by the Office of Administrative Hearings-that is, by the state-it is speculative to state that such ALJ's would be "more impartial" than those employed directly by a particular agency. We will not presume that state- employed professional ALJ's cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency that directly employs them. The procedure here was constitutionally permissible.

B.

(4a) We turn now to the substance of the case and the continuing viability of Rule 143.3. In our view, the Board erred in underestimating the state's power to impose regulations directed at the undesirable "secondary effects" of certain types of entertainment and the establishments offering them. Furthermore, the Board failed to give adequate consideration to the rule that reasonable restrictions on the "time, place, and manner" of expression may be constitutionally valid. Finally, we reject any reliance by the Board on an alleged de minimis theory.[7]

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[7] At oral argument, Vicary complained that our tentative opinion focused on the "facial validity" of Rule 143.3, while her attack was primarily on the *application* of the rule. While this is true, we take this approach because the Board's opinion can be read as reflecting the belief that *nonobscene* conduct cannot be regulated by the state even in conjunction with the sale of alcoholic beverages. The Board's lengthy discussion of what it referred to as the "continually evolving and highly controversial area of the law" and the underlying constitutional principles strongly suggested to us that it believed the rule to have been undermined by recent cases.

(5) It has long been recognized that "there is no inherent right to sell intoxicating liquors, that the liquor business is fraught with danger to the community, and [that it] may therefore be either entirely prohibited, or permitted under such conditions as are prescribed by the regulatory agency." (*Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 296 [4 Cal.Rptr.2d 280].) Once granted, a license may be revoked or suspended for the protection of the public welfare and morals. (Cal. Const., art. XX, §§ 22; *Harris v. Alcoholic Bev. Con. Appeals Bd.* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74].) Thus, the state may properly regulate establishments which sell alcoholic beverages to patrons to protect the public interest in a safe and relatively seemly environment.

(4b) In *California v. LaRue* (1972) 409 U.S. 109 [93 S.Ct. 390, 34 L.Ed.2d 342] (*LaRue*), the Supreme Court upheld the essential validity of Rule 143.3. In part, the court relied on the authority given to the states by the Twenty-first Amendment.[8] However, it also noted that Rule 143.3 constituted at most a minimal infringement on true expressive conduct. Acknowledging that the regulation would affect

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The Department's concern, in its petition, to affirm the validity of the rule indicates that its reading of the Board's decision was similar to ours. Accordingly, we address these issues at some length for the guidance of the Board.

[8] In addition to repealing Prohibition (U.S. Const., 18th Amend.), the Twenty-first Amendment, section 2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

some conduct protected by the First Amendment, the court stated that "the critical fact is that California has not forbidden these performances[9] across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." (*LaRue, supra,* 409 U.S. at p. 118 [93 S.Ct. at p. 397].) (6)(See fn. 10.) The court further took note that the adoption of Rule 143.3 was based on substantial evidence that nude performances in conjunction with the sale of liquor led not only to lewd conduct by customers inside the business premises, but also to prostitution, indecent exposure, and sexual assault in the vicinity.[10] (4c) As is still broadly recognized today: "Liquor and sex are an explosive combination." (*Blue Canary Corp. v. City of Milwaukee* (7th Cir. 2001) 251 F.3d 1121, 1124 (*Blue Canary*).) Although Vicary denies that the government has any interest in regulating the effect of speech on the listener, these cases also establish that in the limited context

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[9] E.g., "performances" featuring sodomy, flagellation, and bestiality, as well as the tamer type of touchings involved here.

[10] A governmental unit need not conduct its own study regarding these effects, but may rely on evidence " 'already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' " (*BZAPS, Inc. v. City of Mankato* (8th Cir. 2001) 268 F.3d 603, 606; see also *City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 51 [106 S.Ct. 925, 930-931, 89 L.Ed.2d 29].) In this case, the Department did conduct certain studies before adopting the rule, and there is no evidence in the record that things have changed. Information from other jurisdictions, gleaned from reported cases, confirms that establishments offering both alcohol and "adult entertainment" still tend to attract both crime and disorderly behavior.

of liquor regulation, such an interest not only exists, but can be a proper exercise of the police power.

Several years later, a California court relied on *LaRue*'s approval of Rule 143.3 to uphold the granting of injunctive relief against an establishment which proposed to offer alcoholic beverages and "entertainment" which would concededly violate Rule 143.3. (*Stroh v. Midway Restaurant Systems, Inc.* (1986) 180 Cal.App.3d 1040, 1053-1054 [226 Cal.Rptr. 153].) Our Supreme Court also cited *LaRue* in discussing and distinguishing an ordinance whose prohibition of nude dancing extended *beyond* establishments offering alcoholic beverages. (*Morris v. Municipal Court* (1982) 32 Cal.3d 553, 560 [186 Cal.Rptr. 494, 652 P.2d 51].) Thus, the validity of Rule 143.3 would appear to be well established.

However, the Board concluded that more recent decisions from the United States Supreme Court undermined the authority of *LaRue* in crucial respects. As we will explain, this conclusion was wrong. The Board relied on *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484 [116 S.Ct. 1495, 134 L.Ed.2d 711] (*44 Liquormart*), in which the court retreated from the *LaRue* court's reliance on the Twenty-first Amendment as conferring an added presumption of validity upon alcohol-related regulation of expressive conduct. Instead, the court held that the Twenty-first Amendment did not qualify or diminish the states' obligations to respect the First Amendment. (*44 Liquormart, supra,* 517 U.S. at pp. 515-516 [116 S.Ct. at pp. 1514-1515].)

44 Liquormart, however, was not a dancing-in-bars case, but rather involved Rhode Island's attempt to impose a total prohibition on the advertising of alcoholic beverages. The

bulk of the discussion involves the regulation of commercial speech in general. Although the state's attempt to rely on *LaRue*' s gloss of the Twenty-first Amendment led to the retrenchment discussed above, the Supreme Court also commented: "We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. [¶¶] *Entirely apart* from the Twenty-first Amendment, the State has *ample power* to prohibit the sale of alcoholic beverages in inappropriate locations." (*44 Liquormart, supra,* 517 U.S. at p. 515 [116 S.Ct. at p. 1514], italics added.)[11]

In other words, the Supreme Court in *44 Liquormart* stated that *LaRue* was correctly decided, that is, that the Department's adoption of Rule 143.3 was constitutionally permissible even though the buttress of the Twenty-first Amendment had been removed. Other courts have concluded that *44 Liquormart* does not obliterate the states' powers to regulate the combination of alcohol and expressive conduct. (E.g., *BZAPS, Inc. v. City of Mankato, supra,* 268 F.3d at p. 608; *El Marocco Club, Inc. v. Richardson* (R.I. 2000) 746 A.2d 1228.)

Confirming this view is the high court's opinion in a case decided after *44 Liquormart*, *Erie v. Pap's A.M.* (2000) 529

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[11] The power to which reference is made is, of course, the police power. (See generally *Berman v. Parker* (1954) 348 U.S. 26, 32-33 [75 S.Ct. 98, 102-103, 99 L.Ed. 27].) The California Constitution also contains a specific grant of regulatory power relating to alcoholic beverages in article XX, section 22.

U.S. 277 [120 S.Ct. 1382, 146 L.Ed.2d 265] (*Pap's A.M.*).[12] In *Pap's A.M.*, the challenged local ordinance banned *all* public nudity, and the challenge was brought by an establishment which wished to present nude dancing. For our purposes, the case makes two significant points: (1) Although nude dancing is covered by the First Amendment, it falls "only within the outer ambit" of protection (*Pap's A.M., supra,* 529 U.S. at p. 289 [120 S.Ct. at p. 1391]; see also *Barnes v. Glen Theatre, Inc.* (1991) 501 U.S. 560, 565-566 [111 S.Ct. 2456, 2459-2460, 115 L.Ed.2d 504]); and (2) If a regulation is directed at genuine "secondary effects" of the regulated conduct, the regulation should be deemed "content neutral" for the purpose of determining the level of scrutiny.[13]

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[12] The Board was aware of the *Pap's A.M.* decision, but believed that it did not provide a "clear answer" to the questions in this case.

[13] To give a concrete example, a rule barring a dancer from "snapping" her breast by pulling on a ring attached to it (as was done by one of the dancers here) is content neutral because the dancer could intend to express any number of views, opinions, feelings, invitations, et cetera. The regulation is not concerned with the intended content of the "snapping."

Vicary argues strenuously that because Rule 143.3 is directed towards performances rather than the state of nudity, it is content directed and unconstitutional, thus attempting to distinguish *Pap's A.M.* However, even a case cited by Vicary recognizes that in the context of "adult entertainment," arguably content-directed regulations are commonly analyzed as content neutral if they can be *justified* without reference to content. (*Schultz v. City of Cumberland* (7th Cir. 2000) 228 F.3d 831, 845 (*Schultz*).)

(*Pap's A.M., supra,* 529 U.S. at pp. 292-296 [120 S.Ct. at pp. 1392-1395].)

The seminal content-neutral case, in turn, is *United States v. O'Brien* (1968) 391 U.S. 367 [88 S.Ct. 1673, 20 L.Ed.2d 672] (*O'Brien*), which arose out of the burning of a draft card allegedly with the expressive intent of protesting the Vietnam conflict. As the court explained in *Pap's A.M.*, in *O'Brien*, the statute prohibiting such destruction was "aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance ...." (*Pap's A.M., supra,* 529 U.S. at p. 291 [120 S.Ct. at p. 1392].) Such a statute was, and is, subject to an intermediate level of scrutiny which focuses on four factors: (1) Is the regulation within the power of the government to enact? (2) Does it further an important or substantial governmental interest? (3) Is the governmental interest unrelated to the suppression of free expression? (4) Is the restriction no greater than is essential to the furtherance of the governmental interest? (*Id.* at pp. 296-301 [120 S.Ct. at pp. 1394-1397].)

Even if the legal analysis of *LaRue* were no longer available to support Rule 143.3, an analysis under *Pap's A.M.* and *O'Brien* would be appropriate and would lead to the same result. As *Pap's A.M.* confirms, the state is authorized under the police power to enact regulations affecting public health and morality. (*Pap's A.M., supra,* 529 U.S. at. p. 296 [120 S.Ct. at pp. 1394-1395].) As *LaRue* also recognized, the adoption of Rule 143.3 was supported by ample evidence of the deleterious effects inherent in the combination of alcoholic

beverages and explicitly erotic performances.[14] Regulation of the performances will therefore logically reduce the negative secondary effects and thus further the governmental interest. (See *Pap's A.M., supra,* 529 U.S. at pp. 300-301 [120 S.Ct. at pp. 1396-1397].) Turning to the third *O'Brien* factor, the governmental interest is not related to the suppression of any particular expression or expression in general. Finally, as was noted in *Pap's A.M.*, Rule 143.3 "regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.*" (*Pap's A.M.*, at p. 301 [120 S.Ct. at p. 1397], original italics.)[15]

Hence, in our view the latest pronouncements of the United States Supreme Court tend to confirm, rather than undercut, the validity of Rule 143.3. The Board incorrectly found otherwise. First, the Board distinguished *Pap's A.M.* by noting that it involved a total ban on public nudity, while Rule 143.3 regulates the conduct of a dancer who may be clothed. We do not see a great deal of significance to this. Secondly, the

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[14] Furthermore, at this point in time, courts are generally willing to accept the existence of negative "secondary effects" either as a matter of "common sense" or through reliance on reports from other jurisdictions. (See *Sammy's of Mobile, Ltd. v. City of Mobile* (11th Cir. 1998) 140 F.3d 993, 997.)

[15] Justice Scalia, concurring in the judgment, and Justice Stevens, dissenting, commented that the requirement of pasties and G-strings would not be likely to substantially reduce the negative secondary effects. The court-via Justice O'Connor's plurality opinion-agreed that while a requirement that "erotic" dancers be fully clothed would probably be more effective, the fact that the City of Erie chose to experiment with a less drastic restriction could not be considered a factor invalidating the regulation.

Board believed that "by singling out specific elements of conduct, devoid of context, [Rule 143.3] threatens to inhibit expression more than a minimal amount."[16]

However, to the extent that a ban on self-touching limits expression more than a requirement of pasties and G-strings, the Board has failed to give adequate weight to the fact that Rule 143.3 operates only in the field of licensed premises. As the Department points out, Rule 143.3 can also be fairly characterized as a "time, place, and manner" restriction. (See *City of Renton v. Playtime Theatres, Inc., supra*, 475 U.S. 41, 46 [106 S.Ct. 925, 928].) The Department is not attempting to regulate or prohibit nude or erotic dancing in general. It is only attempting to reduce the problems caused by such dancing in front of customers whose inhibitions and ability to control their impulses have been weakened by the consumption of liquor. If performers at Vicary's establishment feel constricted by Rule 143.3, they are free to exhibit their wares (and whatever else they wish) at clubs which do not serve alcoholic beverages. The *location-limited* effect of Rule 143.3 was cited as the "critical fact" favoring

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[16] In this respect it also felt that because the Department "has culled touches which lasted only seconds" from some 48 minutes of dance, "it is inescapable that the content of the expression is what the Department found to be offensive." Not so; what the Department found offensive was the specific conduct which violated Rule 143.3. Contrary to the Board's view, we think it extremely unlikely that these isolated bits of conduct were uniquely expressive or essential to the message-if any, as Justice Scalia would probably remark-of the dances. (See *Pap's A.M., supra*, 529 U.S. at p. 310 [120 S.Ct. at p. 1402] (conc. opn. of Scalia, J.).)

a finding of constitutional validity in *LaRue*, *supra*, 409 U.S. at page 118 [93 S.Ct. at page 397]. If it is supported by substantial governmental concerns, a regulation touching on expression is nevertheless valid so long as "reasonable alternative avenues of communication" remain.[17] (*City of Renton v. Playtime Theatres, Inc., supra,* 475 U.S. at p. 50 [106 S.Ct. at p. 930].) Such alternatives remain available here.

In our view, nothing in the subsequent decisions rendered by the high court affects this point as applied to the case at bar. We have considered a case cited by Vicary, *Schultz, supra,* 228 F.3d 831, in which the court did express the view that regulation of the dancers' sexually oriented self- touching gestures constituted an impermissible burden on expression. (*Id.* at p. 845.) Assuming this view is correct, *Schultz* is not controlling because it did not involve the combination of alcohol and sexually suggestive performance; the establishment in question did not serve liquor. Furthermore, *Schultz* involved a total ban on nude dancing and specified sexual gestures, so that no "time, place, and manner" analysis could be applied. On the other hand, in *Blue Canary, supra,* 251 F.3d at page 1124, the court had no difficulty upholding what was essentially a zoning regulation because "[the expression is] not suppressed but merely shoved off to another part of town."[18]

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[17] That is, avenues for the same type of expression.

[18] The *Blue Canary* court, in a typically stylish and forthright opinion by Judge Posner, also described the "impairment of First Amendment values" as "slight to the point of being risible ...." (*Blue Canary, supra,* 251 F.3d at p. 1124.)

We are also unpersuaded that the decision in *LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146 requires that Rule 143.3 be struck down. In that case, which involves what the Department now admits was a "mistake,"[19] an organization proposed to hold a sort of trade show which would include a display of erotic art and photographs. The show was to be held at a large convention center which held a liquor license. Relying on title 4, section 143.4 of the California Code of Regulations,[20] the Board warned the convention center that its license would be revoked if it permitted the exhibition to open-despite the trade show's offer to declare an "alcohol free zone" and to sell no alcohol in the portion of the center containing the show. (*LSO, Ltd. v. Stroh, supra,* 205 F.3d at p. 1151.)

It is obvious that this is exactly the sort of heavy-footed attempt to regulate fully protected expression that the Supreme Court, in *LaRue*, suggested might present itself in the future, although it was *not* presented in that case. (*LaRue, supra,* 409 U.S. at p. 119, fn. 5 [93 S.Ct. at p. 397].) Insofar as the Ninth Circuit Court of Appeals expressed doubts about the continuing viability of *LaRue*, as we have explained, we do not share them. It may well be true that Rule 143.3 could

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[19] In her return, Vicary requested that we ask the Department, at oral argument, whether it believed that Rule 143.3 would apply to prohibit an actress at the Mark Taper Forum Theatre in Los Angeles from touching her breasts through her clothing. It is obvious from the Department's characterization of its actions in *LSO, Ltd. v. Stroh*, that the answer would be "no."

[20] This rule is very similar to Rule 143.3, except that it regulates the display of art, films, etc. in licensed premises.

not be constitutionally applied to a reasonably high-minded display of serious artistic material in conjunction with alcohol, but that is not this case. As the cases reiterate, erotic dancing is not entitled to the same protection as Shakespeare's Hamlet.[21]

The Board was also concerned that the Department's actions were motivated "by what it perceives as the primary effects of the expression, i.e., the effect on the audience-'sexual arousal.' " Coupled with this was a criticism that there had been no finding that the touchings were "not part of the expressive element of the dance," and no attempt to "assess the impact the prohibition might have had upon the expression reflected in the dance." Of course the Department, and Rule 143.3, are indirectly concerned with the arousing effects of the prohibited conduct; that is not disputed. We may also assume, arguendo, that a dancer's expression of sensual emotion may be impaired if she cannot fondle her breasts or genitals. However, if expression tends to create deleterious secondary effects-here, immoral or unlawful actions by the viewers-*Pap's A.M.* confirms that some regulation of the

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[21] We use the example, because the Department suggests that a licensed bar could not circumvent Rule 143.3 by having a performer recite "the soliloquy from Hamlet while fondling her breasts or genitalia." We are not sure this is a correct statement. A performance of Hamlet in which the performer playing Ophelia fondled herself while nude during the "mad scene" would be artistically viable (and has probably been done). For example, Ophelia's songs include the lyrics "Then up he rose, and donn'd his clothes; And dupp'd the chamber-door; Let in the maid, that out a maid; Never departed more." (Shakespeare, Hamlet, act IV, scene 5.)

expression is permitted; the hands of the state are not constitutionally bound. And although Rule 143.3 may reach more broadly than would be permissible for a regulation of conduct in *all* places, it is properly applied to regulate the "explosive" combination of liquor and sex. (See *Blue Canary, supra,* 251 F.3d at p. 1124.)

Vicary strenuously argues in line with the decision of the Board that the touchings involved should be viewed as integral parts of the artistic expression and therefore protected. She concedes that "prolonged" touching for "no artistic purpose" would violate Rule 143.3, but insists that this is a different case and that it is unconstitutional to forbid "brief" touchings in the context of expressive dance. Instead, she suggests that the Board (and this court) must evaluate each touching.[22]

We disagree. The prohibition of Rule 143.3 is clear and the touchings here were not inadvertent. We decline to hold that the minimal constitutional protection to which the dancers are entitled requires that they be permitted one or more "freebies." Furthermore, Vicary, and the dancers, cannot have it both ways. If the touchings were truly insignificant, there is a similarly insignificant effect on expression if the touchings are banned. On the other hand, if the touchings were the highlight of erotic expression, they were likely to

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[22] The standards for evaluating the proposed touchings would presumably include both duration and the intended expression or content.

spark exactly those reactions in the customer which Rule 143.3 properly attempts to prevent.[23]

Although Vicary argued at the hearing that her dancers were on the more protected part of the continuum running from Pavlova and Baryshnikov at the one end, to live-sex-on-stage performers at the other, experience indicates otherwise.[24] The record indicates only that the dancers performed to brief recorded songs, during which they typically removed their tops and, prompting this case, frequently caressed their breasts. Common sense-and the assumption underlies dozens of cases-suggests that gentlemen do not go to topless bars to see "Swan Lake" or even Twyla Tharp, and that a topless establishment which hoped to be successful would not offer such fare. While we agree that the conduct involved does not approach that cited in *LaRue* (see fn. 9, *ante*), we decline to hold that a state may prohibit performers from having sex

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[23] Of course, if the touchings were unrelated to any expression at all, they could be regulated, as even Vicary concedes.

[24] Vicary requests that we take judicial notice of the fact that singer Michael Jackson frequently grabs his crotch during performances. In the same spirit, it is not unfair for us to rely on other than direct experience in characterizing the typical topless dances performed in bars.

We note that at oral argument, Vicary appeared to take the position that there was no "continuum" supporting a varying application of the First Amendment. We believe that the United States Supreme Court has clearly recognized that the constitutional protection varies with the type of speech, and that it lightens (but does not dissipate) near the "outer ambit" in which Vicary's dancers operate. (See *Pap's A.M.*, *supra*, 529 U.S. at p. 289 [120 S.Ct. at p. 1391].)

with animals in bars, but must permit female dancers to rub their genitals and snap their bare breasts at the customers.[25] In terms of the potential for negative secondary effects, the distinction is one of degree and is not significant.

Agreed, dancers of this sort are entitled to at least some First Amendment protection. However, they are not entitled to flout rules enacted in the hope of maintaining some level of decorum in the potentially inebriated patrons, not only while on the premises, but after they leave. The state, through the Department, has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments which serve alcohol, and the Constitution is not thereby offended.

It remains to consider whether Vicary should be given the opportunity to request the Board to reconsider the penalty imposed, an issue which became moot when the Board overturned the decision on the Rule 143.3 violations. We believe that Vicary is entitled to a determination on this point.

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[25] Vicary argued strenuously at oral argument that the rule was not violated when the dancer "Pamela" manipulated her bare breasts by pulling on an implanted ring. The evidence also showed that "Pamela" violated the rule by flesh-to-flesh touchings as well. We find no need at this point to determine whether such a ring should be considered as a "fixture" and part of the breast itself for the rule's purposes. We will leave that issue for a case which involves nothing *but* implanted rings and manipulation of the breasts thereby.

Disposition

The order of the Board is annulled. The matter is remanded to the Board for reconsideration of the penalty imposed.

McKinster J., and Gaut J., concurred.

APPENDIX C

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-7606

RENEE VICARY dba Angels Sport Bar
1650 East Sixth Street, Corona, CA 91719,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 48-275530 Reg: 99047236

Administrative Law Judge at the Dept.
Hearing: John P. McCarthy

Appeals Board Hearing: April 5, 2001
Los Angeles, CA

ISSUED AUGUST 16, 2001

Renee Vicary, doing business as Angels Sport Bar, appeals from a decision of the Department of Alcoholic

Beverage Control[1] which suspended her on-sale general public premises license for 30 days for permitting acts by entertainers found to have violated Department Rule 143.3(1)(b) and 143.3(2) (Title 4, Cal. Code Regs., §143.3, subd. (1)(b) and 143.3, subd. (2).)

Appearances on appeal include appellant Renee Vicary, appearing through her counsel, Roger Jon Diamond, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

DISCUSSION

The question presented by this appeal is whether the Department of Alcoholic Beverage Control may discipline a licensee for permitting conduct by topless dancers which, although violative of the provisions of Rule 143.3, were not found to be obscene. Or, stated another way, does the First Amendment's protection of speech and expression extend to topless dancers who, in the course of their performance, engage in activities which violate the literal prohibitions against certain kinds of touching set forth in the Department's Rule 143.3, but which the Department did not find to be obscene?

We approach the difficult issues in this case with thoughtful consideration, cognizant of the controversial nature of the type of entertainment involved, and aware of our

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[1] The decision of the Department, dated March 23, 2000, is set forth in the appendix.

responsibility to reconcile the obligations of the Department to protect the welfare and morals of the people of the State of California with the rights of speech and expression guaranteed by the First Amendment of the Constitution of the United States. In so doing, we have attempted to review the applicable law, as reflected in decisions of the California Supreme Court and the Supreme Court of the United States, and distill from these reported cases, the correct rule to be applied in this case. This has not been an easy task.[2]

> Department Rule 143.3, the focus of this case, provides as follows:
>
> "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such acts or conduct are permitted.

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[2] The liberty of speech clause of the California Constitution (article I, section 2, subdivision (a)) has been said to be broader and more protective than the free speech clause of the First Amendment. (*See Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 365-367 [93 Cal.Rptr.2d 1]), and the cases cited therein. Although this constitutional provision has not been alluded to in the decisions of the California Supreme Court addressing the constitutional issues involved in regulating topless and nude dancing, its existence cannot be ignored. That being said, we think the result we reach is attainable without resort to this provision, and certainly not in conflict with it.

> "Live entertainment is permitted on any licensed premises, except that:
>
> "(1) No licensee shall permit any person to perform acts of or acts which simulate: ... "(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals. ...
>
> "(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only on a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron."

Read literally, subdivision (1) of the rule applies to any person, including patrons, while subdivision (2) applies only to entertainers. This distinction probably does not matter in this case, since all of the questioned acts were by entertainers.

The Department found this rule to have been violated on two separate occasions by the conduct of a total of eight dancers, four on each of the two dates in question. The pertinent findings, based upon the testimony of one Department investigator, were as follows:

(a) Michele, while dancing topless on a raised stage, placed her hands on her exposed breasts, and, using her hands, moved her breasts about. Michelle touched her breasts

with her hands five times during the dance, each separate touching lasting a matter of a second or two.[3]

(b) Brandi, while dancing topless on a raised stage, placed her hands on her exposed breasts and, using her hands, moved her breasts about. Brandi touched her breasts with her hands three times during the dance, each separate touching lasting a matter of a second or so.[4]

(c) Cynthia,[5] while dancing topless on a raised stage, placed her hands on her exposed breasts and, using her hands, moved her breasts about. It w as not established how many times, if more than once, Cynthia touched her breasts with her hands. The finding included no reference to the duration of the touching.[6]

(d) "Baby Girl," while dancing topless on a raised stage, placed her hands on her exposed breasts and, using her hands, moved her breasts about. "Baby Girl" touched her breasts with her hands at least four times during the dance.

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[3] Finding of Fact III.

[4] Finding of Fact IV.

[5] Two of the dancers were named Cynthia. Each danced on a separate night.

[6] Finding of Fact V.

The finding included no reference to the duration of the touching.[7]

(e) Cynthia,[8] during one of her dances, sat with her legs and feet extended, and while seated in that fashion, within two or three feet from some patrons, manipulated one cup of the bikini top she was wearing so that an entire breast became uncovered. The breast remained uncovered for about one minute. The exposure did not appear to the Department investigator to have been accidental.[9]

(f) Robyn, while dancing topless on a raised stage, placed her hands on her exposed breasts and rubbed her hands across her breasts. It was not established how many times, if more than once, Robyn touched her breasts with her hands. One touching, however, lasted about a second.[10]

(g) Leticia, during one of her dances, sat on the floor of the stage with her legs and feet extended, and while seated in that fashion, rubbed her hands over her genitals. There was no finding as to how long this occurred. Leticia also rubbed

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[7] Finding of Fact VI.

[8] The second of the two Cynthias.

[9] Finding of Fact VIII.

[10] Finding of Fact IX.

her hands across her breasts once or twice for about a second or two each time.[11]

(h) Pamela, while dancing topless on a raised stage, used rings affixed to her pierced nipples to pull her breasts away from her body and then released the rings so the breasts snapped back. Pamela also used her hands to cup her breasts from beneath and used her hands to move her breasts up and down. The finding does not state the frequency or duration of this touching.[12]

The Department rejected appellant' s contention that the rule, as applied, violated appellant's constitutional guarantees of free speech. It found that there was nothing in evidence concerning the communicative intent of any of the dancers involved, and that if appellant had known or been informed of the conduct in question, she would have disciplined the dancers involved.[13] Continuing, the Department stated:

> "*California* v. *LaRue* ... upheld the regulation 143.3(1)(b) on it s face, against constitutional attack, saying states 'may sometimes proscribe expression that is directed to the

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[11] Finding of Fact X.

[12] Finding of Fact XI.

[13] This issue can be disposed of quickly. Appellant's standards for control of her dancers are irrelevant in the context of this appeal.

> accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action.' ... In this tavern environment, the body exposure and the rubbing and touching by the dancers involved in this case appears intended to communicate only one thing, sexual arousal. The conduct need not be lewd or obscene to be lawfully prohibited." [Citations omitted.]

The task which now confronts this Board is to determine whether the Department's decision and its rationale comport with the law in this area as explained by the California Supreme Court and the United States Supreme Court. Given the number and complexity of the decisions in this continually evolving and highly controversial area of the law, our task is not an easy one. Nevertheless, we believe that we owe it to the appellate court which, in all likelihood, will sit in review of our decision, to set forth as best we can our rationale based on our understanding of the law. To do so, we begin with the earliest California Supreme Court decision addressing the subject of dance as expression protected by the First Amendment.

In *In re Giannini* (1968) 69 Cal.2d 563 [72 Cal.Rptr. 655, 656], Albert Giannini, a nightclub manager, and Kelly Iser, a topless dancer, were found guilty of violating Penal Code §314, subdivision (1) (wilful and lewd exposure), and §647, subdivision (a) (lewd and dissolute conduct), but successfully sought a writ of habeas corpus from the California Supreme Court, contending that the statutes under which they were convicted were unconstitutionally vague, and

that the prosecution had failed to provide evidence of community standards relating to the conduct involved.[14] Justice Tobriner, writing for five justices of the court, began the court's opinion with the following observation:

> "Our ruling in this case rests on the simple proposition that a dance performed before an audience for entertainment cannot be held to violate the statutory prohibitions of indecent exposure and lewd or dissolute conduct in the absence of proof that the dance, tested in the context of contemporary community standards, appealed to the prurient interest of the audience and affronted standards of decency generally accepted in the community."

The court grounded its decision squarely on First Amendment principles, seeing dance as a mode of expression analogous to other media of expression, such as motion pictures, which were held entitled to the protections of the First Amendment in *Joseph Burstyn, Inc. v. Wilson* (1952)

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[14] Section 314 provided that "every person who wilfully and lewdly . .. (1) exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby ... is guilty of a misdemeanor." Section 647, subdivision (a), provided that " every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: (a) Who solicit s anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view ."

343 U.S. 495 [72 S.Ct. 777]. The state of the law in California, as of the time In re Giannini was decided, is seen in the following language of the opinion:

> "[T]he performance of the dance indubitably represents a medium of protect ed expression. To take but one example, the ballet obviously typifies a form of entertainment and expression that involves communication of ideas, impressions, and feelings. Similarly, Iser' s dancing, how ever vulgar and taw dry in content, might well involve communication to her audience. In fact , the Attorney General basically argues that Iser's dance violated the statute because it communicated improper ideas to her audience.[15] This implicit admission of the Attorney General undermines his preliminary contention that the dance does not enjoy at least a prima facie protection of the guarantees of the First Amendment. Precisely because, as the Attorney General points out, the performed dance primarily constitutes a form of expression and

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15 We cannot help but note the similarity between the Attorney General's position, as described by the court , with the inconsistent observation in the Department' s decision in the present case that, despite the fact that it found "nothing in evidence concerning the communicative intent of any of the dancers involved in this matter ... the body exposure and the rubbing and touching of the dancers involved in this case appears intended to communicate only one thing, sexual arousal."

communication, it potentially merits First Amendment protection.

"The prima facie applicability of the First Amendment to this medium of communication, the dance, does not fail merely because the particular form of its manifestation may be obnoxious to many persons. Although the Attorney General contends that 'topless dancing,' as performed in the instant case, cannot it self demonstrate any social value worthy of protection under the First Amendment, it is 'as much entitled to the protection of free speech as the best of [dance].' [Citation] 'The line ... is too elusive'.. . to allow for particularized judgments as to whether each individual example of expression possesses social values meriting First Amendment protection."

In re Giannini, 73 Cal.Rptr. at 660 .]

Thus having established its premise that topless dancing enjoyed prima facie protect ion under the First Amendment, the court framed the central question of the case as whether Iser's performance lost its privileged status because it was obscene: "The proper issue here therefore turns on whether the alleged unlawful conduct, which is inextricably part of the dance, forfeits constitutional protection because of it s obscene nature. " Analyzing the requirements of California's obscenity statutes, the court reversed the convictions because the prosecution had failed to

introduce expert evidence of community standards, either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency.

Only five years later, in *Crownover v. Musick* (1973) 9 Cal.3d 405 [107 Cal.Rptr. 681], the court upheld against constitutional challenge ordinances which prohibited the service of food and drink and the providing of entertainment by "topless" women and "bottomless" persons of either sex in any establishment, as well as live acts and exhibitions by such persons in any public place other than theaters or similar establishments primarily devoted to theatrical performances. In so doing, the court deemed the ordinances directed at conduct, not words or speech, thus not presenting it with the problems raised in obscenity cases.

Drawing on the balancing test outlined in *United States v. O'Brien* (1968) 391 U.S. 367 [88 S.Ct. 1673], in which the United States Supreme Court upheld, against a First Amendment challenge, the conviction of a Viet Nam War protester who burned his draft registration card, the court concluded that the ordinances were within the power of the governmental entities to regulate conduct, and furthered an important or substantial interest, one unrelated to the suppression of free expression, which imposed no restriction greater than necessary to further that governmental interest.

The court concluded its opinion by overruling In re Giannini, supra, stating:

"In the sum we hold that the ordinances deny neither freedom of speech and expression nor

> the equal protection of the laws but are in all respects valid and constitutional regulations of conduct. Sections 318.5 and 318.6 of the Penal Code authorizing such ordinances were enacted after our decision in *In re Giannini* ... . To the extent that it is inconsistent with the views expressed herein *Giannini* is overruled." (Crownover v. Musick, 9 Cal.3d at 431.)

Justice Tobriner, the author of In re Giannini, dissented. Joined by Justice Mosk, he sharply criticized the majority opinion:

> "The majority opinion, indeed, dangerously destroys long-held, laboriously built constitutional protections of the communicative arts. ... The majority's metaphysical severance of speech from 'conduct,' (or the extent of costumes) would permit the prohibition of such 'nude' dancing. ... The rationalization, the ruling, the holding, is that 'nude' conduct can be differentiated from speech or communication and, as such, subjected to regulation or prohibition. At one stroke of the pen the majority have thereby torn down the constitutional protections of the communicative arts, exposing the drama, the motion picture, the dance, the opera, the visual arts, sculpture, and communicative entertainment in general, to unbridled censorship. The careful delineation of constitutionally protected expressions as opposed to those that are

> obscene under the decisions is apparently no longer viable. The rulings are circumvented by the new conduct-communications fictitious dualism." (*Crownover v. Musick*, supra, 9 Cal.3d at page 437.)

The dissent took further issue with the majority's application of the four-prong test from *United States v. O'Brien*, supra, disagreeing with the majority as to each element of the test. To Justice Tobriner, it was doubtful that the government has an inherent power to regulate nude entertainment in bars and restaurants. But, assuming for purpose of argument that the state does have such an interest, he did not consider it substantial, nor did he believe it is unrelated to the suppression of free expression. Finally, he was unconvinced the ordinances imposed no greater restriction than necessary to protect whatever legitimate governmental interest there might have been:

> "If compelled to describe the state's interest in regulating nude entertainment before voluntary adult audiences, I should be constrained to use the antonyms of the terms set out in *O'Brien*; I would describe that interest as 'non-compelling,' 'unimportant,' 'insignificant,' and 'dubious.' I would conclude that such an interest does not justify any restriction upon protected expression." (Id. at 443.)

In *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr. 330], the court denied a writ of prohibition halting a prosecution for a violation of Penal Code §647,

subdivision (a) (solicitation of lewd or dissolute conduct), sought by a defendant who had solicited an undercover police officer for an act of oral copulation. In so doing, the court construed the term "lewd and dissolute" to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct. By doing so, the court avoided holding the statute unconstitutionally vague.

The court noted that the vagueness issue had reached the court on only one prior occasion, in *In re Giannini*, where it expressly limited its interpretation of the statutory term "lewd or dissolute" to mean "obscene," for the purpose of determining the alleged obscenity of a dance performed before an audience for entertainment, "an activity which, we reasoned, involved 'communication of ideas, impressions and feelings.'" *In re Giannini* was not controlling because Pryor was charged with a lewd and dissolute act, not a lewd and dissolute communication. The court also acknowledged that the reasoning which had led it to apply an obscenity test to reverse the conviction in *In re Giannini* was itself repudiated in *Crownover v. Musick*, supra.

In *Morris v. Municipal Court* (1982) 32 Cal.3d 553 [186 Cal.Rptr.494], the court again was confronted with a challenge to a county ordinance of the type upheld in *Crownover*. Morris, a dancer, had been arrested for exposing her buttocks during a performance. After reviewing various

United States Supreme Court and lower court rulings involving nude entertainment, including *California v. LaRue* (1972) 409 U.S. 109 [93 S.Ct. 390], *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922 [95 S.Ct. 2561], and *New York State Liquor Authority v. Bellanca* (1981) 452 U.S. 714 [101 S.Ct. 2599], all of which drew upon the supposed authority derived from the Twenty-First Amendment, the court concluded that the ordinance was overbroad, since it extended to any establishment whether or not the establishment was one which served or sold alcoholic beverages. In so doing, the court overruled Crownover v. Musick, supra, stating:

> "From our review of the foregoing decisions, we draw vital conclusions. (1) A ban on nude dancing cannot be sustained on the theory that it regulates only conduct and does not impinge upon protected speech. Nonobscene nude dancing cannot be barred without, in some cases, infringing upon constitutional expression. [Ftnt. omitted] An enactment prohibiting nonobscene nude dancing which extends beyond establishments serving alcohol is presumptively overbroad. [Ftnt. omitted] Each of these conclusions is fundamentally at odds with the reasoning of the *Crownover* majority. We conclude that the *Crownover* analysis is no longer viable, and declare that, to the extent it is inconsistent with the present opinion, *Crownover* v. *Musick*, supra, ... is overruled." (*Morris v. Municipal Court*, supra, 32. Cal.3d at 564- 565.)

In the footnote omitted from the above, the court quoted extensively from *In re Giannini's* definition of dance as an expression of emotions and ideas.

Morris v. Municipal Court, supra, although the most recent pronouncement of the California Supreme Court in the area of nude or topless dancing, may no longer represent the law. The United States Supreme Court cases which provided the underpinning for *Morris*'s distinction between establishments which serve alcohol and those which do not - *California v. LaRue and New York State Liquor Authority v. Bellanca, supra* - have been stripped of any force, insofar as they had held that the Twenty-First Amendment permitted a state to prohibit speech or expression otherwise protected under the First Amendment.

In *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 481 [116 S.Ct. 1495], the Supreme Court held unconstitutional as violative of the First Amendment a state-wide ban on liquor price advertising. The decision marked an abandonment by the Supreme Court of its view that the Twenty-first Amendment empowered states to prohibit conduct otherwise entitled to protection under the First Amendment. In an opinion written by Justice Stevens, and reflecting his earlier dissent in *New York State Liquor Authority v. Bellanca, supra*, 452 U.S. at 723-724, the court, while not questioning the holding in *California v. LaRue*, expressly disavowed its reasoning to the extent based upon the Twenty-first Amendment, explaining:

> "In reaching its conclusion, the Court of Appeals relied on our decision in *California*

v. *LaRue*, 409 U.S. 109 (1972). [Ftnt. omitted] In *LaRue*, five members of the Court relied on the Twenty-first Amendment to buttress the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages. Specifically, the opinion stated that the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity. ... We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment.

"Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved. ...

"Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. ...

> " ... Accordingly, we now hold that the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."

517 U.S. at 515-516.

Although the question goes somewhat beyond the issues in this case, we are, nonetheless, compelled to doubt that the Morris rationale for distinguishing between establishments which serve alcoholic beverages and those which do not would survive reexamination by the California Supreme Court, in light of the language in *44 Liquormart regarding California v. LaRue* and the Twenty-first Amendment.

In *Barnes v. Glen Theatre, Inc.* (1991) 501 U.S. 560 [111S.Ct. 2456], the Court upheld an Indiana public indecency statute which required that dancers wear pasties and G-strings against a First Amendment challenge brought by two establishments seeking to offer totally nude entertainment. In so doing, the Court found support in its prior cases for the proposition that nude dancing of the kind sought to be performed here was expressive conduct within the outer perimeters of the First Amendment, but viewed it as "only marginally so." [501 U.S. 566.] Applying the four-prong test of *United States v. O'Brien* (1968) 391 U.S. 367 [88 S.Ct.1673], the Court upheld the statute "despite its incidental limitations on some expressive activity' [501 U.S. at 567] because "[p]ublic nudity is the evil the State seeks to

prevent, whether or not it is combined with expressive activity." [501 U.S. 572.]

More recently, in *City of Erie v. Pap's* (2000) 529 U.S. ___ [___ S.Ct. ___] (March 29, 2000),a divided United States Supreme Court upheld, against a First Amendment challenge, an ordinance of the City of Erie, Pennsylvania which banned public nudity. Four members of the Court (Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer, in an opinion written by Justice O'Connor), found the ordinance constitutional because (1) the city's efforts to protect public health and safety were clearly within its police powers; (2) it furthered an important government interest in regulating conduct through a total nudity ban and of combating the harmful secondary effects associated with nude dancing; (3) the ordinance was "content neutral," unrelated to the suppression of free expression; and (4) the restriction (that a dancer wear pasties and a G-string) was no greater than was essential to further the government interest, since it regulated conduct and had only a de minimus impact on the expressive element of nude dancing.

Any effect on the overall expression would be de minimus, Justice O'Connor wrote, because

> "even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers ... are free to perform wearing pasties and G-strings." 529 U. S. at ___ (slip opinion, page 13).

Seeing the purpose of the ordinance as aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments, the Court concluded that the ordinance was not aimed

> "at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare ... ." (Id. at page 10.)

Justices Scalia and Thomas concurred in the judgment of the Court. In an opinion written by Justice Scalia, he expressed the view that the law, being a general prohibition of public nudity, was not within the ambit of the First Amendment. Justice Souter concurred with the reasoning of the plurality opinion, but felt the city had not made a sufficient evidentiary showing to justify the ordinance. Justices Stephens and Ginsburg dissented, asserting that the Court had never before held that secondary effects could justify the total suppression of protected speech; prior decisions had only extended that approach to regulation of location.

Despite the fact that City of *Erie v. Pap's* is the most recent pronouncement by the United Supreme Court, it does not provide a clear answer to the issues in this case. There are three reasons why we think this. First, the Department's rule is not a total ban on nudity. Instead it is an attempt to regulate

conduct by a performer who may or may not be nude. Second, by singling out specific elements of conduct, devoid of context, the rule threatens to inhibit expression more than a minimal amount. Indeed, the Department relies on a snapshot record of expressive conduct as the basis for its findings that the rule was violated. The record indicates that, from a total of 48 minutes of dance, the Department has culled touches which lasted only seconds. Third, it is inescapable that the content of the expression is what the Department found to be offensive.

It appears that the Department, in pursuing this matter, is largely, if not entirely, motivated by what it perceives as the primary effects of the expression, i.e., the effect on the audience - "sexual arousal" - of watching topless erotic dancing. There was no finding by the Department that the touchings said to violate Rule 143.3 were not part of the expressive element of the dance, nor any attempt to assess the impact the prohibition might have had upon the expression reflected in the dance - nor could it. (See *In re Giannini*, supra, at page 8, citing *Winters v. New York* (1948) 333 U.S. 507, 510 [68 S.Ct. 665,667]. See also, dissenting opinion in *Barnes, supra*, at 2475, quoting from *Cohen v. California* (1971) 403 U.S. 15, 25 [91 S.Ct. 1780, 1788]. Without such findings, and without evidence to support such findings, we can only conclude that the application of Rule 143.3 to the dancers in appellant's employ, in the circumstances of this case, infringed upon the constitutional rights of expression enjoyed by appellant and the dancers in her establishment by virtue of the First Amendment.

ORDER

The decision of the Department is reversed.[16]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[16] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by § 23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

APPENDIX D

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

FILE: 48-275530
REG: 99047236

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on March 23, 2000.

A REPRESENTATIVE OF THE DEPARTMENT WILL CALL ON YOU ON OR AFTER MAY 11, 2000 TO PICK UP THE LICENSE CERTIFICATE .

Sacramento, California

Dated: March 23, 2000

/s/ Sandra J. Meek
Supervisor, Hearing and Legal Unit

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board,-660 J Street, Suite 443, Sacramento, CA 95814.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

Renee Vicary	)	FILE: 48-275530
dba Angels Sport Bar	)	REG: 99047236
1650 East Sixth Street	)	LICENSE TYPE: 48
Corona, CA 91719,	)	PAGES: 115
	)	REPORTER:
Respondent,	)	Jane Brugger Kennedy Court Reporters

On-sale General Public Premises License.

PROPOSED DECISION

This matter was heard by John P. McCarthy, Administrative Law Judge of the Department of Alcoholic Beverage Control, Administrative Hearing Office, at Riverside, California, on January 21, 2000.

John W. Lewis, Staff Counsel, represented complainant Department of Alcoholic Beverage Control [hereinafter "Department"].

Respondent, Renee Vicary [hereinafter "'respondent"], was personally present and was represented by Roger Jon Diamond, Attorney at Law.

Evidence, both oral and documentary, was received and the matter was argued and submitted. The Administrative Law Judge now finds, determines, and orders as follows:

FINDINGS OF FACT

I

Respondent operates the above-described business and has held an On-sale General Public Premises License issued by the Department at that location since October 14, 1992. That license permits the sale of beer, wine and distilled spirits for consumption on the licensed public premises.

II

On or about September 10, 1999, the Department filed an accusation against respondent pursuant to the Alcoholic Beverage Control Act and the State Constitution alleging in counts 1 through 4 and 6 through 8 that respondent permitted seven distinct individuals in the above-described licensed premises to violate subsection (1) (b) of Section 143.3 of Chapter 1, Title 4, of the California Code of Regulations [hereinafter "Rule 143.3"] by touching, caressing or fondling their breasts and/or genitals. The violations allegedly occurred on two different dates in early 1999. In count 5 it was alleged that respondent permitted a named entertainer to expose a breast to the view of investigators at a time when the entertainer was not sufficiently removed from the nearest patron, in violation of subsection (2) of Rule 143.3.

A Notice of Defense appears to have been timely filed in accordance with the requirements of California Government Code Section 11506 and the matter was duly set for hearing.

At the outset of the hearing, respondent objected to having her case heard by an Administrative Law Judge who is employed by the Department, basing her argument on "federal and state due process grounds" Essentially, respondent asked that California Business and Professions Code Section 24210 be adjudged unconstitutional. It is beyond the power of the Administrative Law Judge and the Department itself to declare Section 24210 unconstitutional. Respondent's objection is overruled at this stage in the proceeding.

III

A. On February 11, 1999, a dancer, identified by the on-duty disc jockey as Michelle, performed as an entertainer inside respondent's above-described licensed premises.

B. During one of Michelle's dances, she removed the top to her costume and danced topless. While dancing topless, she was performing on a raised stage.

C. During Michelle's topless dance, she placed her hands on her exposed breasts and, using her hands, moved her breasts about. Michelle touched her breasts with her hands five times during the dance. Each separate touching lasted a matter of a second or two.

IV

A. On February 11, 1999, a dancer, identified-by the on-duty disc jockey as Brandi, performed as an entertainer inside respondent's above-described licensed premises.

B. During one of Brandi's dances, she removed the top to her costume and danced topless. While dancing topless, she was performing on a raised stage.

C. During Brandi's topless dance, she placed her hands on her exposed breasts and, using her hands, moved her breasts about. Brandi touched her breasts with her hands three times during the dance. Each separate touching lasted a matter of a second or so.

V

A. On February 11, 1999, a dancer, identified by the on-duty disc jockey as Cynthia, performed as an entertainer inside respondents above-described licensed premises.

B. During one of Cynthia's dances, she removed the top to her costume and danced topless, While dancing topless, she was performing on a raised stage.

C. During Cynthia's topless dance, she placed her hands on her exposed breasts and, using her hands, moved her breasts about. It was not established how many times, if more than once, Cynthia touched her breasts with her hands.

VI

A. On February 11, 1999, a dancer, identified by the on-duty disc jockey as "Baby Girl," performed as an entertainer inside respondent's above-described licensed premises.

B. During one of "Baby Girl's" dances, she removed the top to her costume and danced topless. While dancing topless, she was performing on a raised stage.

C. During "Baby Girl's" topless dance, she placed her hands on her exposed breasts and, using her hands, moved her breasts about. "Baby Girl" touched her breasts with her hands at least four times during the dance.

VII

On February 11, 1999, while Michelle, Brandi, Cynthia and "Baby Girl" were dancing as described above, respondent was exercising the privileges of her license.

VIII

A. On April 7, 1999, a dancer, identified by the on-duty disc jockey as Cynthia (true name likely Kimberly Elaine Fleshner and not the same person as the one who was identified as Cynthia on February 11, 1999), performed as an entertainer inside respondent's above-described licensed premises.

B. During one of Cynthia's "dances" on the smaller stage, she sat down of the floor of the stage with her legs and feet extended. While seated in that fashion, Cynthia manipulated one cup of the bikini top she was wearing so that an entire breast became uncovered.

C. While the breast remained uncovered entertainer Cynthia was within two to three feet of some patrons. The breast remained uncovered for about a minute. The exposing of

Cynthia' s breast did not appear to Department Investigator L. M. Spencer to have been accidental.

IX

A. On April 7, 1999, Robyn Ann Gushi, performed as an entertainer inside respondent's above-described licensed premises.

B. During one of Gushi's dances, she removed the top to her costume and danced topless. While dancing topless, she was performing on a raised stage.

C. During Gushi's topless dance, she placed her hands on her exposed breasts and robbed her hands across her breasts. It was not established how many times, if more than once, Gushi touched her breasts with her hands. One touching, however, lasted about a second.

X

A. On April 7, 1999, Leticia Gonzalez, performed as an entertainer inside respondent's above-described licensed premises.

B. During one of Gonzalez's "dances," she sat down of the floor of the stage with her legs and feet extended. While seated in that fashion, Gonzalez rubbed her hands over her genitals.

C. Gonzalez also rubbed her hands across her breasts once or twice for about a second or two each time.

XI

A. On April 7, 1999, Pamela Sue Raza, known as "Poison," performed as an entertainer inside respondent's above-described licensed premises.

B. During one of Raza's dances, she removed the top to her costume and danced topless. While dancing topless, she was performing on a raised stage.

C. During Raza's topless dance, she used rings affixed to her pierced nipples to pull her breasts away from her body and then let go of the rings so the breasts "snapped" back.

D. Raza also used her hands to "cup" her breasts from beneath and used her hands to move her breasts up and down.

E. It was not established that Raza touched her genitals while performing at respondent's licensed premises on April 7, 1999.

XII

On April 7, 1999, while Cynthia, Gushi, Gonzalez and Raza were dancing as described above, respondent was exercising the privileges of her license.

XIII

There are two distinct portions of respondent's licensed premises in Corona. The sports bar has been open and operating since the license first issued in 1992. The portion of

the premises where the topless entertainment is provided is separate from the sports bar and has been in operation since some time in 1996. Respondent operates a similar business in Long Beach, California.

XIV

Respondent, Renee Vicary, testified credibly that she has policies in place giving performers guidance as to what conduct is permitted and what conduct is not permitted. She treats the dancers as independent contractors and supervises them with on-site employees. The dancers and the bouncers sign contracts which specify what the dancers are not permitted to do, including touching, caressing or fondling themselves. In addition, the dancers are informed of the rules personally and the rules and relevant regulations are posted in the dressing room.

As for the bouncers, their obligations to monitor and report any violations to respondent are posted at the time clock. Security personnel have assigned posts and while the duties differ somewhat at each post, at least two on-duty personnel are supposed to be watching the dancers to ensure they abide by the rules.

Respondent also has video equipment installed, some cameras of which are focused on the dancing stages. Selected monitors are located in the owner's office and all the cameras have monitors in the manager's office. Respondent was not present during either the February or April visit of the investigators. She did not receive a report of violative behavior from her security personnel as to either date. Further, the February

videotapes were not kept because there was no report of an incident and the tapes were destroyed (taped over). No tapes of the April dances were available since the tape machines were apparently not working. As a result, respondent took no disciplinary against either dancers or security personnel based on any of the above-related incidents.

Respondent has in the past disciplined performers for violating prohibitions covering entertainment and also for suspected drug use or dealing. She claims to both run a right ship and to go out of her way to ensure "the rules" are followed.

XV

Licensee's Prior Disciplinary History

Despite an allegation in the accusation of a matter of prior discipline in 1994 which involved the possession and being under the influence of some controlled substance, no evidence of prior discipline was introduced.

LEGAL BASIS FOR DECISION

I

Article XX, Section 22 of the California Constitution and California Business and Professions Code Section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

II

California Business and Professions Code Section 25750 provides that the Department may make those reasonable rules as may be necessary or proper to carry out the purposes and intent of the duties assigned it by the State Constitution.

III

Rule 143.3 was promulgated pursuant to California Business and Professions Code Section 25750 and relates to entertainers and their conduct on Department-licensed premises. Subsection (1) (b) specifies that no licensee shall permit any person to perform an act of "touching, caressing or fondling on the breast, buttocks, anus or genitals." Subsection 2 amplifies subsection 1 to specify that breasts and/or buttocks may be exposed by entertainers only if the entertainer is performing on "a stage at least 18 inches above the immediate floor level and removed at least six feet from the next patron."

DETERMINATION OF ISSUES

I

Cause for suspension or revocation of respondent's license was established by reason of the matters set forth in Findings of Fact, paragraphs III through VI, for violation of Rule 143.3(1)(b), as alleged in counts 1 through 4 of the accusation.

II

Cause for suspension or revocation of respondent's license was established by reason of the matters set forth in Findings of Fact, paragraph VIII, for violation of Rule 143.3(2), as alleged in count 5 of the accusation.

III

Cause for suspension or revocation of respondent's license was established by reason of the matters set forth in Findings of Fact, paragraphs IX through XI, for violation of Rule 143.3(1)(b), as alleged in counts 6 through 8 of the accusation.

IV

Penalty consideration

Counsel for the Department requested that the license be suspended for a period of 30 days: In making that recommendation, he pointed out that the violations shown were not isolated and the misconduct was not inadvertent, but intended. The investigators visited on two occasions-separated by two months. The violations involved a total of eight different dancers. Further, respondent, who has been running a topless entertainment business at this location since 1996 and in Long Beach for some period of time, either knew or should have known of the rules prohibiting the type of misconduct shown to have occurred.

Respondent did not concede that the violations occurred. In the alternative, respondent contended that the touching was at worst *de minimis* and not worthy of any sanction. Counsel analogized to both professional football and basketball, noting that the touching which was established was not prolonged, it was *incidental* and should not result in any discipline. He asked the Department to exercise some judgment as to whether discipline should be meted out for every *ticky-tack foul,* suggesting there was no harm shown, so no discipline is deserved.

Each individual touch might have been fleeting in nature. The rule, however, places no limit on the duration of the touching, caressing or fondling which is prohibited. Most of the dancers involved in the violations repeated the touching more than once during a single dance, some as many as five times. While each touching lasted from as short as a second to as long as several seconds, there is little doubt the prohibition in the rule against *touching* was violated. On this point, little need be said about the exposure on April 7 of her breast by the dancer known as Cynthia.[1]

Respondent argued that the Department's rules were not intended to cover this particular activity, but if they do, they

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[1] The photographing of the dancers on April 7, Exhibits A-F, was strongly criticized by respondent as unnecessary and intrusive. It is impossible to imagine a legitimate reason for the photographs contained in Exhibits B, D, E or F. Exhibits A, and C do have use and are acceptable, A for identification of the dancer and C to corroborate a charge that Rule 143.3(2) was violated as to exposed buttocks.

run afoul of state and federal constitutional prohibitions concerning interference with free speech. Respondent asked that the rules in question be interpreted so as not to violate the right of the dancers to freely exercise their First and Fourteenth Amendment rights.

First, there is nothing in evidence concerning the communicative intent of any of the dancers involved in this matter. Second, the fair inference of respondent's testimony is that had she observed or even been told of the conduct about which Investigator Spencer testified, she would have taken disciplinary action against the involved dancer.

California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) upheld the regulation 143.3(1)(b), on its face, against constitutional attack, saying, "[s] may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action.' (*Id.,* 409 U.S. at 396.) In this tavern environment, the body exposure and the rubbing and touching by the dancers involved in this case appears intended to communicate only one thing, sexual arousal. The conduct need not be lewd or obscene for it to be lawfully prohibited.

Respondent argued that the Department may not impose strict liability and her business cannot be expected to have no violations at all. Respondent did not and does not condone the conduct engaged in and, therefore, she should not be held liable for it. This argument is likewise rejected. Had a sole dancer engaged in the prohibited conduct on one occasion, this argument might have been persuasive. Here, there were

eight dancers involved in the misconduct, eight different dancers on two different occasions, separated from each other by nearly two months. The misconduct established does not fit the "strict liability" model.

Respondent argued that a 30-day suspension would be "overkill." This is so considering respondents attempts to ensure she runs a clean business. Unfortunately for this contention, respondent's security and monitoring efforts need upending. It seems more than coincidental that no bouncer or security guard reported any of the eight incidents to respondent as seemingly required by his job duties. It seems more than coincidental that respondent was able to recover no tape record of any of the performances in question. Far too much has escaped respondent's attention as she runs this high-risk business for her to benefit from the argument that she has taken every possible step to ensure this type of misconduct will not occur. The only way to ensure that the conduct will not repeat is to impress the importance of such a result on the responsible parry. The ordered suspension should make that impression.

ORDER

As to Determination of Issues, paragraphs I, II, and III, the On-sale General Public Premises License issued to respondent is hereby ordered suspended for a period of thirty (30) days.

Dated: February 28, 2000

/s/ _____
John P. McCarthy
Administrative Law Judge